

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JAMES KEVIN PITTS,

Petitioner,

v.

WARDEN GLEBE,

Respondent.

No. C09-5713 FDB/KLS

REPORT AND RECOMMENDATION

Noted for: May 28, 2010

This case has been referred to United States Magistrate Judge Karen L. Strombom pursuant to Title 28 U.S.C. § 636 (b) (1) and Local MJR 3 and 4. Petitioner James Kevin Pitts filed a federal habeas petition pursuant to 28 U.S.C. § 2254. Dkt. 1. Respondent filed an answer and submitted relevant portions of the state court record. Dkts. 13 and 14. Mr. Pitts filed a response to the answer. Dkt. 15.

Having carefully considered the parties' filings and the record relevant to the grounds raised in the petition, the undersigned recommends that Mr. Pitts's petition for habeas relief be denied and this action dismissed with prejudice.

STATEMENT OF THE CASE

A. Statement of Facts

Mr. Pitts is custody for his conviction of first degree murder. Dkt. 14, Exh. 1. The facts in Mr. Pitts's case were summarized by the Washington Court of Appeals as follows:

1 Pitts served as a staff sergeant in the Army's 864th Engineers Battalion.
2 He served in Iraq from March 2003 until February 2004. During that time he
3 began an adulterous affair with a soldier in his squad, Jackie Besio. The
4 relationship continued when they returned home.

5 On the Friday before Easter, Pitts spent the night with Besio at her
6 apartment. The next day they drove to Seattle with Besio's daughter and Pitts's
7 son, [J]. All four spent the night at a motel in Sea-Tac. The next morning Tara
8 called Besio's cellular telephone and asked Pitts to bring [J] home. After taking
9 [J] home, Besio and Pitts returned to the motel.

10 Tara called again that night to tell Pitts that she had found love letters from
11 Besio in his car and had given them to his military supervisors. Worried about the
12 effect an adultery investigation could have on his remaining time in the army,
13 Pitts flew home to Ohio without leave. He also stated that he went to Ohio rather
14 than kill Tara, because she was trying to "burn" him. 21 Report of Proceedings
15 (RP) at 1314. He called Besio six or seven times while he was in Ohio. When
16 Tara tried to reach him in Ohio, he referred to her calls as "[h]ounding me
17 constantly, constantly, constantly." Clerk's Papers (CP) at 99. His brother also
18 overheard Pitts tell Tara on the phone that he should kill her for reporting his
19 affair to the military.

20 After four or five days, Pitts came to believe that he could work out his
21 differences with his wife and he flew home. The first few days together they were
22 happy, but soon Tara began acting smug and they argued about the affair. That
23 night, a neighbor heard Pitts yelling angrily at Tara and Tara crying.

24 When Pitts woke up on April 21, 2004, Tara was already up. He asked her
25 why [J] did not kiss him that morning when he left for school. Tara kept asking
26 him about his affair with Besio. She told Pitts that she could not forgive him or
trust him. Pitts decided to take a bath and relax. Tara followed him into the
bathroom and continued to talk about the situation until Pitts proposed they have
sex. She agreed and they had sex in the bathroom. Then he grabbed her head and
pushed it into the bathtub, holding it under water until she stopped kicking.

Pitts took Tara out of the bathtub and put her in the bed. He
unsuccessfully tried to revive her. He went upstairs to arrange for a neighbor to
intercept [J] on his way home from school. Pitts also saw [J] at school and gave
him candy, telling him that he would be going away for a few days. At some
point, Pitts called Besio from his apartment and asked her to come by for one last
kiss.

Pitts then left the apartment and went to a convenience store to buy an 18-
pack of beer. He drove to the Fort Lewis bowling alley and drank 13 bottles of

1 beer while sitting in the car. Inside the bowling alley he bought a pitcher of beer
2 and drank about half of it.

3 Around three in the afternoon, Pitts called First Sergeant Mario Powers
4 from the bowling alley and confessed to killing his wife, saying that he intended
5 to turn himself in to the military police. Several agents from the Army's criminal
6 investigations division (CID) arrested Pitts at the bowling alley. The CID agents
7 did not give him *Miranda* warnings. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct.
1602, 16 L.Ed.2d 694 (1966). They transported Pitts to the CID office, where
8 they asked him general background questions and then transferred him to the
9 Lakewood precinct of the Pierce County Sheriff's Department about an hour later.

10 While in the CID office, one of the agents smelled alcohol on Pitts.
11 During his contact with the CID agents, Pitts remained calm and coherent, not
12 appearing to be under the influence of alcohol. He did not stumble while he
13 walked or slur his words. Powers also told a police officer that Pitts sounded
14 sober when he called.

15 When Pitts arrived at the Lakewood precinct, Detectives John Jimenez and
16 Richard Hall took him to an interview room and read him his *Miranda* warnings.
17 Pitts initialed and signed an advisement of rights form and agreed to answer
18 questions. The detectives interviewed Pitts for almost three hours, and Pitts told
19 them about the affair with Besio, the events leading up to the killing, and the
20 killing itself. After the initial interview, Pitts agreed to give a taped statement.
21 The interview concluded around 8:30 p.m.

22 Jimenez and Hall testified that throughout the interview, Pitts did not
23 appear to be under the influence of alcohol because he did not smell of
24 intoxicants, did not have bloodshot or watery eyes, did not slur his words, and
25 remained coherent and coordinated. Based on Pitts's statements about how much
26 alcohol he had consumed that day, Hall suggested that they test Pitts's blood
alcohol level. The results revealed Pitts's blood alcohol level was .13 between 9
and 10 p.m., more than four hours after the interview began.

The State charged Pitts with first degree murder. He moved to exclude his
statements to Hall and Jimenez on the grounds that he was too intoxicated to
voluntarily waive his *Miranda* rights. Finding that Pitts made a knowing,
voluntary, and intelligent waiver of his *Miranda* rights, the trial court ruled that
his statements were admissible.

Early in the trial proceedings, the trial court informed the parties that the
security officers would no longer transport in-custody defendants in public
hallways without restraints. As a result, Pitts would be handcuffed until he was
physically in the courtroom. The trial court stated that the judicial assistant would
verify that the jurors were in the jury room while Pitts was being transported.

1 Nevertheless, when the prospective jurors were asked to leave the room during
2 voir dire, one of the jurors speculated aloud that it was because they could not see
3 the defendant being brought in in handcuffs. Pitts moved to strike the entire
4 venire, and the trial court denied the motion.

5 After trial testimony commenced, a corrections officer misunderstood
6 where the jurors would be during a recess. As a result, when he escorted Pitts
7 back to the courtroom from the restroom, some of the jurors saw Pitts in
8 handcuffs. Pitts moved for a mistrial and the trial court denied the motion.
9 Although both the State and the trial court suggested giving a curative instruction
10 to the jury, Pitts refused.

11 Dkt. 14, Exh. 2, pp. 1-4.

12 **B. Procedural History**

13 Mr. Pitts appealed to the Washington Court of Appeals. Dkt. 14, Exh. 3. The court
14 affirmed Mr. Pitts's judgment and sentence and denied Mr. Pitts's motion for reconsideration.
15 *Id.*, Exhs. 2 and 5. Mr. Pitts sought review by the Washington Supreme Court. *Id.*, Exh. 7. The
16 Washington Supreme Court denied review on February 5, 2008. *Id.*, Exh. 8.

17 In June 2008, Mr. Pitts filed a habeas corpus petition in this court, challenging his
18 custody under the state court judgment and sentence imposed for his conviction of first degree
19 murder. *See* Dkt. 14, Exh. 10 (Docket, *Pitts v. MacDonald*, USDC Cause No. C08-5386
20 FDB/KLS). This court determined the petition was a "mixed petition" because Mr. Pitts had not
21 yet properly exhausted all of his claims. *Id.*, Exh. 11. At Mr. Pitts's request, the court dismissed
22 the 2008 petition without prejudice so that Mr. Pitts could attempt to exhaust his claims in state
23 court. *Id.*, Exh. 12.

24 In January 2009, Mr. Pitts filed a personal restraint petition in the Washington Court of
25 Appeals. *Id.*, Exh. 13. The petition challenged the admissibility of Mr. Pitts's statements. The
26 Washington Court of Appeals dismissed the petition, finding the claim to be frivolous. *Id.*, Exh.
16. Mr. Pitts then sought review by the Washington Supreme Court. *Id.*, Exh. 17. The

1 Washington Supreme Court denied review on November 9, 2009. *Id.*, Exh. 18. The
2 Washington Court of Appeals issued a certificate of finality on December 28, 2009. *Id.*, Exh. 19.

3 **ISSUES FOR FEDERAL HABEAS REVIEW**

4 Mr. Pitts presents the following issues for federal habeas review:

- 5 1) Did Pitts' Company Sgt. (Sgt. Powers), the Criminal Investigation
6 Department (CID), and state police violate Pitts' due process of law, and
7 Miranda rights by admittedly not mirandizing Pitts, even after arresting
8 him, questioning him for over 2 hours (while he was in custody), and
9 obtaining an illegal non-mirandized "alleged" confession while Pitts was a
10 .21 BAC and out of his senses?
- 11 2) Were the Petitioner[']s constitutional rights to a fair and impartial jury
12 violated by the viewing of the petitioner in handcuffs by 3 jurors (25% of
13 the jury vote) and knowledge of Pitts being lead to and from jail to the
14 court house in handcuffs escorted by 2 armed corrections officers,
15 especially when Pitts' defense was diminished capacity which is "fragile"
16 against the presumption of innocence?
- 17 3) Did the above errors when combined together result in cumulative error,
18 violation Mr. Pitts['s] 5th, 6th and 14th Amendments [Rights] to due
19 process and [a] fair trial?

20 Dkt. 2, p. 1.

21 **EXHAUSTION**

22 Respondent concedes that Mr. Pitts properly exhausted his state court remedies by
23 fairly presenting his three claims to the Washington courts as federal claims. Dkt. 13,
24 p. 6.

25 **EVIDENTIARY HEARING**

26 The decision to hold a hearing is committed to the court's discretion. *Williams v.*
Woodford, 306 F.3d 665, 688 (9th Cir. 2002). State court findings are presumptively correct in
federal habeas corpus proceedings, placing the burden squarely on the petitioner to rebut the
presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). In deciding whether to

1 grant an evidentiary hearing, a federal court must consider whether such a hearing could enable
2 an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant
3 to federal habeas relief. *Schriro v. Landrigan*, 550 U.S. 465, 468 (2007). Because the
4 deferential standards prescribed by § 2254 of the Antiterrorism and Effective Death Penalty Act
5 (AEDPA) control whether to grant habeas relief, a federal court must taken into account those
6 standards in deciding whether an evidentiary hearing is appropriate. *Id.*

8 An evidentiary hearing is not required where the petition raises solely questions of law or
9 where the issues may be resolved on the basis of the state court record. *Totten v. Merkle*, 137
10 F.3d 1172, 1176 (9th Cir. 1998). The petitioner must demonstrate that an evidentiary hearing
11 would materially advance his claims and explain why the record before the court, or an expanded
12 record, is inadequate for review. *Totten*, 137 F.3d at 1176-77; see also Rule 8 of the Rules
13 Governing 2254 Cases. It is not the duty of the state court to ensure that the petitioner develops
14 the factual record supporting a claim. *Lambert v. Blodgett*, 393 F.3d 943, 969 n.16 (9th Cir.
15 2004) (citing *McKenzie v. McCormick*, 27 F.3d 1415, 1419 (9th Cir. 1994)); see also *Baja v.*
16 *DuCharme*, 187 F.3d 1075, 1079 (9th Cir. 1999); *In re Rice*, 118 Wash.2d 876, 884, 828 P.2d
17 1086, cert. denied, 506 U.S. 958 (1992).

19 The court finds that an evidentiary hearing is not required because Mr. Pitts's habeas
20 claims are matters that can be resolved by reference to the state court record. His habeas claims
21 raise purely issues of law, rather than factual disputes, and therefore, an evidentiary hearing to
22 resolve questions of fact, is not necessary.

24 STANDARD OF REVIEW

25 Federal courts may intervene in the state judicial process only to correct wrongs of a
26 constitutional dimension. *Engle v. Isaac*, 456 U.S. 107 (1983). Pursuant to the federal habeas

statute for state convictions, a federal court may entertain an application for writ of habeas corpus “only on the ground that [the petitioner] is in custody in violation of the constitution or law or treaties of the United States.” § 2254(a)(1995). The Supreme Court has repeatedly held that federal habeas corpus relief does not lie for errors of state law. *Estelle v. McGuire*, 502 U.S. 62 (1991); *Lewis v. Jeffers*, 497 U.S. 764 (1990); *Pulley v. Harris*, 465 U.S. 37, 41 (1984).

In a habeas corpus petition, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) establishes the district court’s standard of review of the state court’s decision. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005). Under AEDPA, a federal court cannot grant a writ of habeas corpus to a state prisoner with respect to any claim adjudicated on the merits in state court unless the state court’s adjudication of the claim:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The AEDPA standard of review “demands that state-court decisions be given the benefit of the doubt.” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).

Under 28 U.S.C. § 2254(d)(1), a state court decision is “contrary to” the Supreme Court’s “clearly established precedent if the state court applies a rule that contradicts the governing law set forth” in the Supreme Court’s cases. *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). A state court decision also is contrary to the Supreme Court’s clearly established precedent “if the state court confronts a set of facts that are

1 materially indistinguishable from a decision” of the Supreme Court, “and nevertheless arrives at
2 a result different from” that precedent. *Id.*

3 A state court decision can involve an “unreasonable application” of the Supreme Court’s
4 clearly established precedent in the following two ways: (1) the state court “identifies the correct
5 governing legal rule” from the Supreme Court’s cases, “but unreasonably applies it to the facts”
6 of the petitioner’s case; or (2) the state court “unreasonably extends a legal principle” from the
7 Supreme Court’s precedent “to a new context where it should not apply or unreasonably refuses
8 to extend that principle to a new context where it should apply.” *Williams*, 529 U.S. at 407.

9 However, “[t]he ‘unreasonable application’ clause requires the state court decision to be more
10 than incorrect or erroneous.” *Lockyer*, 538 U.S. at 75. That is, “[t]he state court’s application of
11 clearly established law must be objectively unreasonable.” *Id.*

12 Under 28 U.S.C. § 2254(d)(2), a federal petition for writ of *habeas corpus* also may be
13 granted “if a material factual finding of the state court reflects ‘an unreasonable determination of
14 the facts in light of the evidence presented in the State court proceeding.’” *Juan H. v. Allen*, 408
15 F.3d 1262, 1270 n.8 (9th Cir. 2005) (9th Cir. 2005) (quoting 28 U.S.C. § 2254(d)(2)). As noted
16 above, however, “[a] determination of a factual issue made by a State court shall be presumed to
17 be correct,” and the petitioner has “the burden of rebutting the presumption of correctness by
18 clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

21 **DISCUSSION**

22 **First Claim - Admissibility of Confessions**

23 Mr. Pitts argues that his confession was inadmissible because his company sergeant, Sgt.
24 Powers, CID agents, and the state police violated his due process rights by failing to provide him
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1 with *Miranda* warnings, even after he was arrested, questioned for two hours, and while he was
2 “out of his senses” with a .21 BAC. Dkt. 2, p. 5.

3 Over the course of several days the trial court conducted a suppression hearing and heard
4 testimony from several witnesses concerning Mr. Pitts’s use of alcohol and the admissibility of
5 his statements to the police. Dkt. 14, Exh. 20, pp. 29-114; Exh. 21, pp. 334-68; Exh. 22, pp. 379-
6 406; Exh. 31, pp. 97-230; Exh. 33, pp. 243-259. After hearing the testimony, the trial judge
7 determined the statements were voluntary and that Mr. Pitts’s alcohol intoxication was not
8 sufficient to render the statements inadmissible. *Id.*, Exh. 33, pp. 267-269 and 283-286.

10 The Fifth Amendment provides that no person “shall be compelled in any criminal case
11 to be a witness against himself.” This privilege is applicable to the states through the Due
12 Process Clause of the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1 (1964). Although
13 the Fifth Amendment privilege is applicable to the States, the focus in determining the
14 admissibility of a confession in state court criminal proceedings is the Due Process Clause.
15 *Colorado v. Connelly*, 479 U.S. 157, 163 (1986); *Miller v. Fenton*, 474 U.S. 104, 110 (1985);
16 *Mincey v. Arizona*, 437 U.S. 385, 398 (1978). “[C]ertain interrogation techniques, either in
17 isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a
18 civilized system of justice that they must be condemned under the Due Process Clause of the
19 Fourteenth Amendment.” *Miller v. Fenton*, 474 U.S. at 109.

21 The Supreme Court has established procedural safeguards that require police to advise a
22 criminal suspect of his rights, under the Fifth and Fourteenth Amendments, prior to commencing
23 a custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436 (1966). However, the police are
24 required to inform the person of these rights, commonly referred to as *Miranda* warnings, only
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1 when a person is subjected to custodial interrogation by government officials. *Thompson v.*
2 *Keohane*, 516 U.S. 99, 102 (1995).

3 Custodial interrogation is “questioning initiated by law enforcement officers after a
4 person has been taken into custody or otherwise deprived of his freedom of action in any
5 significant way.” *Thompson*, 516 U.S. at 107 (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495
6 (1977) (per curiam)). A person is not in custody for purposes of *Miranda* if there is no “formal
7 arrest or restraint on freedom of movement of the degree associated with a formal arrest.”
8 *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Mathiason*, 429 U.S. at
9 495). The procedural safeguards of *Miranda* applies only to the potentially coercive, “police-
10 dominated atmosphere” of custodial interrogations. *Id.* at 296.

12 Once the suspect is advised of his *Miranda* rights, the police may interrogate the suspect,
13 without the presence of an attorney, if the suspect voluntarily, knowingly and intelligently
14 waives his rights. *Id.* at 444. “[T]he question of waiver must be determined ‘on the particular
15 facts and circumstances surrounding that case, including the background, experience, and
16 conduct of the accused.’” *North Carolina v. Butler*, 441 U.S. 369, 375-76 (1979) (quoting
17 *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

19 A waiver is voluntary if it is “the product of a free and deliberate choice rather than
20 intimidation, coercion or deception.” *Moran v. Burbine*, 475 U.S. 412, 421 (1986). A waiver is
21 knowing and intelligent if it is “made with a full awareness both of the nature of the right being
22 abandoned and the consequences of the decision to abandon it.” *Moran*, 475 U.S. at 421. “[A]
23 state trial court’s determination that a defendant knowingly and intelligently waived his *Miranda*
24 rights is entitled to a presumption of correctness pursuant to section 2254(d).” *Derrick v.*
25 *Peterson*, 924 F.2d 813, 823 (9th Cir. 1990). “The ultimate issue of ‘voluntariness’ is a legal
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1 question requiring independent factual determination.” *Miller*, 474 U.S. at 110. But a state
2 court’s factual determinations underlying the issue of voluntariness are presumed correct.
3 *Miller*, 474 U.S. at 112. “[A]n issue does not lose its factual character merely because its
4 resolution is dispositive of the ultimate constitutional question.” *Id.* at 113.

5 In determining whether a confession was voluntary the Court must consider whether,
6 “the government obtained the statement by physical or psychological coercion or by improper
7 inducement so that the suspect’s will was overborne.” *Derrick v. Peterson*, 924 F.2d at 817.
8 Whether a confession is voluntary within the meaning of the Due Process Clause “turns as much
9 on whether the techniques for extracting the statements, as applied to this suspect, are compatible
10 with a system that presumes innocence and assures that a conviction will not be secured by
11 inquisitorial means as on whether the defendant’s will was in fact overborne.” *Miller*, 474 U.S.
12 at 116 (emphasis in original).

13 A necessary predicate to finding a confession involuntary is the “crucial element” of
14 overreaching, coercive activity by the police that is causally related to the confession. *Connelly*,
15 479 U.S. at 163-64 & n.1. The defendant’s mental condition is relevant to determining his
16 susceptibility to police coercion, but mental deficiencies alone in the absence of police coercion
17 do not render a confession involuntary. *Connelly*, 479 U.S. at 165; *Derrick*, 924 F.2d at 818.
18 Absent coercive police misconduct, there is simply no basis for concluding that a confession was
19 involuntary in violation of the fourteenth amendment. *Connelly*, 479 U.S. at 167. The fact that a
20 suspect is “groggy” or under the influence of alcohol or drugs will not necessarily render a
21 confession involuntary. *See Pollard*, 290 F.3d at 1034-36; *United States v. George*, 987 F.2d
22 1428, 1430-31 (9th Cir. 1993); *Medeiros v. Shimoda*, 889 F.2d 819, 823 (1989); *United States v.*
23 *Martin*, 781 F.2d 671, 673-74 (9th Cir. 1985). Similarly, “a ‘defendant’s mental state alone does

not make a statement involuntary.” *Pollard*, 290 F.3d at 1034 (quoting *United States v. Orso*, 266 F.3d 1030, 1039 (9th Cir. 2001) (en banc)) (other citations omitted).

1. Telephonic Statements to Sgt. Powers

Mr. Pitts first alleges that when he called Sgt. Powers from the bowling alley and told him that he killed his wife, Sgt. Powers should have read Mr. Pitts his *Miranda* rights. Mr. Pitts further argues that “Sgt. Powers was in charge of a company in Pitts’ battalion” and “knew Pitts’ was A.W.O.L., and needed to be arrested, and solicited an alleged non *Mirandized* confession from Pitts.” Dkt. 2, p. 14.

In rejecting this argument, the Washington Court of Appeals stated:

Pitts called Sergeant Powers from a bowling alley and “confessed to killing his wife, saying that he intended to turn himself in to the military police.” *State v. Pitts*, noted at 137 Wn. App. 1005 (February 7, 2007). CID agents arrested Pitts, but did not give him *Miranda* warnings. They transported him to the CID office, asked him general background questions, and then transferred him to the Pierce County Sheriff’s Department. There, detectives read him *Miranda* warnings and took his confession. On direct appeal, we held that Pitts’ confession to the detectives was voluntary, but we did not address the admissibility of his statements to Powers or CID and did not discuss the exclusionary rule.

...

Pitts fails to demonstrate facts that would entitle him to relief. He asserts that Sergeant Powers did not give him *Miranda* warnings, but these warnings are required only if the suspect is in custody and is being interrogated. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Pitts does not allege, and as a matter of law the facts do not support, a finding that Powers [sic] was in custody when he called Powers from a bowling alley and confessed to killing his wife. After the CID arrested Pitts, he was apparently in custody and we indicated in our direct appeal opinion that CID did not give *Miranda* warnings to him. But we also stated that CID elicited only “background information” from Pitts and he does not contend that CID interrogated him or that he gave any incriminating statements at that time. *Pitts*, noted at 137 Wn. App. 1005. In light of the deficiency of factual allegations to support this petition, we dismiss this frivolous petition on the merits.

1 Dkt. 14, Exh. 16, pp. 1-3.

2 In denying review, the Washington Supreme Court agreed that Mr. Pitts failed to show a
3 *Miranda* violation because he had not been subjected to custodial interrogation either by Sgt.
4 Powers or the CID investigators:

5 Mr. Pitts contends that his conviction must be reversed because he was not
6 advised by Sergeant Mario Powers and Army criminal investigators of his rights
7 under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
8 But *Miranda* warnings apply only to custodial interrogations. *Id.* at 444-45. Mr.
Pitts spontaneously called Sergeant Powers from a bowling alley and told him that
he killed his wife. There was no custodial interrogation.

9 As to the military investigators, Mr. Pitts is correct that he was not given
10 *Miranda* warnings when the investigators initially detained him. But those
11 investigators did not elicit any incriminating information, asking only limited
12 background questions before handing Mr. Pitts over to the county sheriff's office.
13 At the sheriff's office detectives read Mr. Pitts his *Miranda* rights, obtained his
waiver, and took a detailed confession. The admissibility of that confession was
affirmed in Mr. Pitts's direct appeal.

14 Dkt. 14, Exh. 18, pp. 1-2.

15 Mr. Pitts argues that Sgt. Powers should have informed him of his Article 31 UCMJ
16 rights, or *Miranda* rights but instead, Sgt. Powers illegally elicited incriminating information
17 from Mr. Pitts. Dkt. 2, p. 8.

18 There is no evidence that Mr. Pitts was in custody or subjected to an interrogation when
19 he spontaneously telephoned Sgt. Powers from a bowling alley and told him that he killed his
20 wife. There is no evidence that there was an active criminal investigation ongoing and in fact, no
21 evidence that anyone knew that Tara Pitts had been murdered prior to the defendant's phone call
22 to Sgt. Powers. There was no custodial interrogation, even if there was a possibility that Mr.
23 Pitts was going to say something that could result in a criminal charge and jail time. In addition,
24 whether Sgt. Powers knew that Mr. Pitts was absent without leave at the time and "needed to be
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1 arrested,” the evidence reflects that Mr. Pitts had not been arrested and was not in custody. As
2 noted above, custodial interrogation is “questioning initiated by law enforcement officers after a
3 person has been taken into custody or otherwise deprived of his freedom of action in any
4 significant way.” *Thompson*, 516 U.S. at 107 (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495
5 (1977) (per curiam)). A person is not in custody for purposes of *Miranda* if there is no “formal
6 arrest or restraint on freedom of movement of the degree associated with a formal arrest.”
7 *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Mathiason*, 429 U.S. at
8 495).

10 Mr. Pitts was not subjected to custodial interrogation during the phone call, which he
11 himself initiated and which he could have terminated at any time. Under these facts, no *Miranda*
12 warning was necessary. See *Saleh v. Fleming*, 512 F.3d 548, 552 (9th Cir. 2008). Mr. Pitts was
13 not entitled to the protections of *Miranda* because he was speaking to his first sergeant, not the
14 police or any other government agent. See e.g., *Arizona v. Mauro*, 481 U.S. 520, 528-29, 107
15 S.Ct. 1931, 95 L.Ed.2d 458 (1987). Moreover, the telephonic statements were not coerced. A
16 coerced confession is one in which, under “the totality of the circumstances, the government
17 obtained the statement by physical or psychological coercion or by improper inducement so that
18 the suspect's will was overborne.” *United States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th
19 Cir.1988) (citing *Haynes v. Washington*, 373 U.S. 503, 513-14, 83 S.Ct. 1336, 10 L.Ed.2d 513
20 (1963)). The evidence in this case is undisputed that Mr. Pitts voluntarily made the telephone
21 call and spontaneously made the statements. There is no evidence that his will was overborne.
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24 Thus, the state courts did not commit constitutional error in concluding that Mr. Pitts’s
25 telephonic statements were admissible and the undersigned recommends that Mr. Pitts’s claim
26 for habeas relief on this claim be DENIED.

2. Statements to Army CID Investigators

There is also no evidence that Mr. Pitts was interrogated by the Army CID investigators while he was in their custody. Instead, the evidence reflects that the Army CID investigators took only background information from Mr. Pitts before they turned him over to civilian authorities. Although it is undisputed that Mr. Pitts was “in custody” after he was arrested by the Army CID investigators, the obligation to administer *Miranda* warnings attaches once a person is subject to “custodial interrogation.” *Miranda v. Arizona*, 384 U.S. 436, 445, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Not every question asked in a custodial setting constitutes interrogation. *U.S. v. Chen*, 439 F.3d 1037, 1040 (9th Cir.2006) (citing *U.S. v. Booth*, 669 F.2d 1231, 1237 (9th Cir.1982)). “[I]nterrogation means questioning or ‘its functional equivalent,’ including ‘words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Pope v. Zenon*, 69 F.3d 1018, 1023 (9th Cir.1995) (quoting *Innis*, 446 U.S. 291 at 301, 100 S.Ct. 1682, 64 L.Ed.2d 297). Whether custodial questioning constitutes custodial interrogation is an objective inquiry, and the subjective intent of the police, though relevant, is not determinative because the focus is on the defendant's perception. *U.S. v. Chen*, 439 F.3d 1037, 1040 (9th Cir.2006) (citation omitted). “This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police.” *Innis*, 446 U.S. at 301. Thus, the fact that a question is objective, or was not asked in an attempt to elicit evidence of crime, is insufficient for finding that the questioning is not an interrogation. *Booth*, 669 F.2d at 1238. “Even a relatively innocuous question may, in light of the unusual susceptibility of a particular subject, be reasonably likely to elicit an incriminating

1 response.” *Id.* (citing *Innis*, 446 U.S. at 302 n. 8); see also *United States v. Henley*, 984 F.2d
2 1040, 1042 (9th Cir.1993). Ultimately “[t]he test is whether, under all the circumstances
3 involved in a given case, the questions are ‘reasonably likely to elicit an incriminating response
4 from the suspect.’” *Chen*, 439 F.3d at 1040 (quoting *Innis*, 446 U.S. at 301).

5 During the time he was in CID temporary custody, he was questioned only as to personal
6 administrative questions to fully identify Mr. Pitts. Dkt. 14, Exh. 20, p. 70. He was not given
7 his *Miranda* rights before he was asked background questions by the CID agents as he was in
8 their temporary custody, they were not conducting an investigation, and they intended to release
9 him to the civilian law enforcement agency that would handle the case. Dkt. 14, Exh. 20, pp. 68-
10 69.
11

12 In his investigation report, Special Agent Rasmussen stated that Mr. Pitts also made
13 several spontaneous statements in his presence and in the presence of Special Agents Brannon
14 and Lake, including: “I know why you’re here”; “I will cooperate, just don’t let my son go to an
15 orphanage”; “That’s capital murder”; “Why is the government letting me go? They’re going to
16 kill me. They’re going to give me the death penalty.” Dkt. 14, Exh. 20, pp. 104-105. Special
17 Agent Rasmussen also testified that he did not elicit any answers from Mr. Pitts or ask any
18 questions of Mr. Pitts. Dkt. 14, Exh. 20, p. 109.
19

20 Special Agent Kevin Michael Brannon of the CID testified that at the time they
21 approached Mr. Pitts in the bowling alley, no one asked Mr. Pitts any questions. Dkt. 14, Exh.
22 31, pp. 105-106. He also testified that Mr. Pitts was not advised of his *Miranda* warning because
23 the murder was committed off base and Pierce County had the primary jurisdiction; they were
24 only apprehending Mr. Pitts for public safety reasons. *Id.*, pp. 106-106.
25
26

1 The routine gathering of background biographical information does not constitute
2 interrogation for purposes of *Miranda*. See *United States v. Washington*, 462 F.3d 1124, 1132-
3 33 (9th Cir.2006) (citations omitted). Several courts have concluded that general questions about
4 background do not constitute “interrogation,” and officers can ask such questions even after the
5 defendant invokes his rights to remain silent and to consult an attorney. See *United States v.*
6 *Glen-Archila*, 677 F.2d 809, 815 (11th Cir.1982); *United States v. Turner*, 565 F.2d 539, 541
7 (8th Cir.1977).

9 The trial court correctly concluded that Mr. Pitts’s spontaneous statements to the CID
10 agents were admissible (*i.e.*, “I know why you’re here”; “I will cooperate, just don’t let my son
11 go to an orphanage”; “That’s capital murder”; “Why is the government letting me go? They’re
12 going to kill me. They’re going to give me the death penalty”). Various other courts have
13 concluded that statements made while an officer was collecting background information were
14 admissible because they were spontaneous and unrelated to the questions posed. See *United*
15 *States v. Gay*, 774 F.2d 368, 379-80 (10th Cir.1985); *United States v. Suggs*, 755 F.2d 1538,
16 1541 (11th Cir.1985); *State v. Miner*, 22 Wn. App. 480, 591 P.2d 812 (1979). In this case, Mr.
17 Pitts offers no persuasive argument that the officer's questions were designed to elicit an
18 incriminating response or that his statements were coerced or involuntary.

19 Accordingly, the undersigned recommends Mr. Pitts’s claim for federal habeas relief on
20 this issue be DENIED.
21

22 **3. Voluntariness of Confession After Miranda**

23 Mr. Pitts was given his *Miranda* warnings once he was in custody of the Lakewood
24 Police Department. He disputes, however, the trial court’s finding that he voluntarily waived his
25 *Miranda* rights. He asserts that his intoxicated state prevented him from making a voluntary
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1 waiver and therefore rendered inadmissible his later confession to the City of Lakewood
2 detectives. He asserts that because his blood alcohol level was later confirmed to have been over
3 .20 at the time he allegedly waived his *Miranda* rights that the police officer's failure to observe
4 any indication of intoxication is irrelevant and suspect. Dkt. 2, p. 17. He further argues that his
5 mental condition at the time must be taken into consideration because he had just returned 63
6 days earlier from Iraq and was experiencing sleepless nights and extreme anxiety. Dkt. 15, p. 2.

7
8 The Washington Court of Appeals rejected Mr. Pitts's claim that his waiver of *Miranda*
9 rights was involuntary:

10 Pitts next argues that the trial court erred in refusing to suppress his
11 statements to Jimenez and Hall because insufficient evidence supported a finding
12 that he voluntarily waived his *Miranda* rights.

13 We review a trial court's rulings on the admissibility of evidence for abuse
14 of discretion. *Powell*, 126 Wn.2d at 258. A custodial confession is admissible
15 when the defendant is advised of his rights to counsel and to remain silent before
16 interrogation and knowingly, voluntarily, and intelligently waives those rights.
17 *Miranda*, 384 U.S. at 473-75; *State v. Aten*, 130 Wn2d 640, 663, 927 P.2d 210
18 (1996). Whether a confession is voluntary depends on the totality of the
19 circumstances under which it was made. *Aten*, 130 Wn.2d at 663-64.
20 "Intoxication alone does not, as a matter of law, render a defendant's custodial
21 statements involuntary and thus inadmissible." *State v. Turner*, 31 Wn. App. 843,
22 845-46, 644 P.2d 1224 (1982). We do not disturb a trial court's determination
23 that a confession is voluntary on appeal if substantial evidence supports the trial
24 court's finding that the confession was voluntary by a preponderance of the
25 evidence. *Aten*, 130 Wn.2d at 664.

26 When officers do not threaten the defendant or make promises and the
defendant is unimpaired, substantial evidence exists on which the trial court could
find by a preponderance that the statement was given voluntarily and the waiver
was made knowingly and intelligently. *State v. Alferez*, 37 Wn. App. 508, 510-
11, 681 P.2d 859 (1984). Defensive action is evidence that the defendant was in
full possession of his mental faculties during questioning and therefore capable of
voluntarily, knowingly, and intelligently waiving his rights. *State v. Gregory*, 79
Wn.2d 637, 488 P.2d 757 (1971), *overruled on other grounds in State v. Rogers*,
83 Wn.2d 553, 556, 520 P.2d 159 (1974). But the admissibility of statements
made under the influence of intoxicants must be determined on the facts of each
case. *Gregory*, 79 Wn.2d at 642.

1 Pitts contends that substantial evidence does not support the trial court's
2 findings of fact that he was coherent throughout his contact with the law
3 enforcement officers; that there was no indication he was impaired; that he was in
4 full possession of his mental faculties; and that his ability to knowingly,
intelligently and voluntarily waive his *Miranda* rights was unimpaired. His
argument fails.

5 Evidence is substantial if it is "sufficient to persuade a fair-minded
6 rational person of the truth of the finding." *State v. Levy*, 156 Wn.2d 709, 733,
7 132 P.3d 1076 (2006) (quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d
8 722 (1999)). Patrick Rasmussen, a special agent with the United States Army
9 Criminal Investigation Command, and Hall, Olson, and Jimenez all testified that
Pitts was calm, coherent, and coordinated. Only Rasmussen smelled alcohol on
Pitts's breath and Pitts did not have watery eyes, slur his words, or display signs
10 of intoxication. This testimony is sufficient to persuade a rational person that
despite consuming alcohol that day, Pitts was coherent, did not appear impaired,
11 was in full possession of his mental faculties, and was capable of knowingly and
voluntarily waiving his *Miranda* rights.

12 Psychiatrist Jerry Larson's testimony does not render this testimony
13 insufficient. Larson testified that at the time the interview commenced Mr. Pitts's
14 blood alcohol level would have been .2 to .21. At that level, he opined, a person's
ability to exercise critical judgment and comprehend a situation is always
15 impaired. However, he also conceded that alcohol affects everyone differently
and that Pitts had a high tolerance to alcohol. The trial court was not obligated to
16 accept Larson's expert opinion. *See State v. Lord*, 117 Wn.2d 829, 854, 822 P.2d
17 177 (1991) (weight of expert testimony is a matter for the trier of fact); *State v.*
18 *Toomey*, 38 Wn. App. 831, 837, 690 P.2d 1175 (1984). The trial court could have
reasonably determined that the firsthand accounts of Rasmussen, Hall, Jimenez,
and Olson were more credible than Larson's opinion.

19 The findings adequately support the trial court's conclusion that Pitts
20 voluntarily, knowingly, and intelligently waived his rights. He signed an
advisement of rights form stating that he understood his rights and agreed to
21 waive them. The detectives did not threaten Pitts or make any promises in
exchange for his statement. Although his blood alcohol level was subsequently
22 tested and found to be elevated, several individuals with whom Pitts came into
contact during his arrest did not think he appeared to be intoxicated. Pitts gave a
23 detailed account of the killing during the tape-recorded interview and was
cooperative, matter-of-fact, and articulate. He was hesitant to give Besio's name
24 to the detectives, and his demeanor changed when he spoke about Besio, as
opposed to his wife. These facts support the trial court's conclusion that Pitts's
25 confession was the product of a rational intellect and free will. The trial court did
26

1 not abuse its discretion in denying his motion to suppress his statements to the
2 detectives.

3 Dkt. 14, Exh. 2, pp. 13-15; and Exh. 6 (Order Amending Opinion and Denying Motion for
4 Reconsideration), pp. 1-2.

5 Once properly advised of his rights, an accused may waive them voluntarily, knowingly
6 and intelligently. See *id.* at 475. A valid waiver of Miranda rights depends upon the totality of
7 the circumstances, including the background, experience and conduct of the defendant. See
8 *United States v. Bernard S.*, 795 F.2d 749, 751 (9th Cir.1986). The government has the burden
9 of proving waiver by a preponderance of the evidence. See *Colorado v. Connelly*, 479 U.S. 157,
10 168-69, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); *Lego v. Twomey*, 404 U.S. 477, 488-89, 92 S.Ct.
11 619, 30 L.Ed.2d 618 (1972); *Terrovona v. Kincheloe*, 912 F.2d 1176, 1180 (9th Cir.1990). To
12 satisfy its burden, the government must introduce sufficient evidence to establish that under the
13 totality of the circumstances, the defendant was aware of “the nature of the right being
14 abandoned and the consequences of the decision to abandon it.” *Moran v. Burbine*, 475 U.S.
15 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

16
17 Detective John Jimenez of the Pierce County Sheriff’s Department testified that he read
18 *Miranda* warnings to Mr. Pitts and that as he read the warnings, Mr. Pitts verbally stated “yes”
19 that he understood his rights and wrote the same answer at the end of each question on the
20 advisement of rights form. Dkt. 14, Exh. 33, pp. 144-45. Detective Jimenez testified that Mr.
21 Pitts never invoked his right to remain silent, neither he nor Detective Hall threatened Mr. Pitts
22 or made any promises to Mr. Pitts in return for his statement, and that Mr. Pitts’s statement was
23 given freely and voluntarily. *Id.*, p. 153. Mr. Pitts also consented to providing a tape recorded
24 statement. *Id.*, p. 154.
25
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1 During the taped interview, Detective Jimenez read Mr. Pitts his *Miranda* rights and Mr.
2 Pitts responded “Yes, sir” each time he was asked whether he understood his rights. Dkt. 14,
3 Exh. 33, p. 161. He never asked for an attorney, never invoked his right to remain silent, and
4 was not given any promises in return for his statement by Detectives Jimenez or Hall. *Id.*, pp.
5 161-162. Further, during Detective Jimenez’s contact with Mr. Pitts, Mr. Pitts did not appear to
6 be under the influence of alcohol or drugs “at all.” *Id.*, p. 162.

8 Detective Richard James of the Lakewood Police Department was also present during the
9 questioning of Mr. Pitts and his testimony confirmed that of Detective Jimenez. Dkt. 14, Exh.
10 21, pp. 336-347.

11 Based on the foregoing, the undersigned concludes that there was sufficient evidence to
12 support the trial court’s finding that Mr. Pitts voluntarily waived his *Miranda* rights. In addition
13 to orally indicating that he understood his rights, Mr. Pitts signed a written waiver of those
14 rights. See *Derrick v. Peterson*, 924 F.2d 813, 824 (9th Cir.1990) (“The written waiver is
15 particularly strong evidence that the waiver is valid”). It is clear that the detectives did not use
16 “physical or psychological pressure” to elicit the waiver and Mr. Pitts has not otherwise
17 demonstrated “police overreaching.” *Cox v. Del Papa*, 542 F.3d 669, 675 (9th Cir.2008).

19 The record also supports the trial court’s findings that Mr. Pitts’s intoxication did not
20 render his waiver and subsequent statements involuntary or inadmissible. The U.S. Supreme
21 Court has not explicitly held that a defendant's impairment due to alcohol or drugs renders a
22 statement involuntary. Rather, the determination as to whether a *Miranda* waiver is voluntary
23 “has always depended on the absence of police overreaching, not a ‘free choice’ in any broader
24 sense of the word.” *Connelly*, 479 U.S. at 170.

1 In *Connelly* the defendant confessed to a murder. At the suppression hearing he asserted
2 that his mental illness interfered with his free will and he could therefore not have voluntarily
3 waived his Miranda rights. The U.S. Supreme Court affirmed that “*Miranda* protects defendants
4 against government coercion leading [defendants] to surrender rights protected by the Fifth
5 Amendment; it goes no further than that.” *Connelly*, 479 U.S. at 170.

6
7 In Mr. Pitts’s case, the Washington court relied on precedent utilizing the same analysis.
8 (*State v. Alferez*, 37 Wn. App. 508, 510,-11, 581 P.2d 859 (1984) (“[w]hen officers do not
9 threaten the defendant or make promises and the defendant is unimpaired, substantial evidence
10 exists on which the trial court could find by a preponderance that the statement was given
11 voluntarily and the waiver was made knowingly and intelligently”); *State v. Gregory*, 79 W.2d
12 637, 488 P.2d 757 (1971), *overruled on other grounds in State v. Rogers*, 83 Wn.2d 553, 556,
13 520 P.2d 159 (1974)(“[d]efensive action is evidence that the defendant was in full possession of
14 his mental faculties during questioning and therefore capable of voluntarily, knowingly, and
15 intelligently waiving his rights”), and *State v. Turner*, 31 Wn. App. 843, 845-46, 644 P.2d 1224
16 (1982) (“[i]ntoxication alone does not, as a matter of law, render a defendant’s custodial
17 statements involuntary and thus inadmissible.”)).

18
19 In its opinion, the Washington Court of Appeals noted that the CID officer and
20 Lakewood Police detectives all testified that Mr. Pitts was calm, coherent and coordinated. Dkt.
21 14, Exh. 2, p. 14 and Exh. 6, pp. 1-2. Only Rasmussen smelled alcohol on Pitts’s breath and
22 Pitts did not have watery eyes, slur his words, or display signs of intoxication. The Washington
23 Court of Appeals also noted that the trial court was not obligated to accept the opinion of Mr.
24 Pitts’s expert that his alcohol level at the time of the interview would have been .20 to .21.
25 Rather, the trial court could reasonably have determined that the firsthand accounts of
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1 Rasmussen, Hall, Jimenez, and Olson were more credible. *Id.*, pp. 1-2. Moreover, the testimony
2 of these individuals was sufficient to persuade a rational person that despite consuming alcohol
3 that day, Pitts was coherent, did not appear impaired, was in full possession of his mental
4 faculties, and was capable of knowingly and voluntarily waiving his *Miranda* rights. *Id.*

5 Although Mr. Pitts makes much of the fact that he was intoxicated, the voluntariness of
6 his statement does not depend solely on his intoxication. Rather, the voluntariness depends on
7 whether the law enforcement officials coerced Mr. Pitts into making a statement. See *Connelly*,
8 479 U.S. at 167, 170. As noted above, there is ample evidence in the record that they did not do
9 so but rather, that Mr. Pitts gave a detailed, cooperative, matter-of-fact, and articulate account of
10 the killing.
11

12 The Washington Court of Appeals examined the particular facts and circumstances of the
13 case, including Mr. Pitts's alcohol level, his demeanor during the interview, his detailed and
14 coherent account of the killing, and the lack of threats or promises by the detectives at the scene.
15 Dkt. 14, Exh. 2, pp. 13-15. Thus, it cannot be said that the state court's standard for evaluating
16 whether Mr. Pitts waived his *Miranda* rights was contrary to clearly established federal law as
17 determined by the Supreme Court. See 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362,
18 402-03, 120 S.Ct. 1495 (2000).
19

20 Furthermore, the Washington Court of Appeal's decision was not an unreasonable
21 application of Supreme Court precedent. The record amply supports the conclusions of the
22 Washington State courts that Mr. Pitts was fully cognizant of the consequences of his statement
23 when he made them even if he was intoxicated and that the detectives did not threaten him or
24 make any promises in exchange for his statement. The record reflects that Mr. Pitts was fully
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1 advised of his *Miranda* rights, he stated that he fully understood those rights, and he signed a
2 written waiver of those rights.

3 In addition, Mr. Pitts argues that his statement was not voluntary because he had returned
4 from Iraq some 63 days before the murder and was suffering from combat stress. Dkt. 15, p. 2.

5 Mr. Pitts is correct that when a court is considering whether a confession is voluntary, a
6 court must consider the totality of the circumstances, including the background, experience,
7 conduct, and mental capacity of the defendant. *United States v. Garibay*, 143 F.3d 534, 536,
8 538 (9th Cir.1998). However, a confession is involuntary only if the police use coercive means
9 to undermine the suspect's ability to exercise his free will. *Henry v. Kernan*, 197 F.3d 1021 (9th
10 Cir.1999), cert. denied, 528 U.S. 1198, 120 S.Ct. 1262, 146 L.Ed.2d 117 (2000).

11 The undersigned finds no evidence of police coercion in this case. There is no evidence
12 of a lengthy sustained interrogation. There is no evidence that Mr. Pitts's cognitive abilities
13 were impaired so that he could not understand his *Miranda* rights when advised.¹ As noted
14 above, the state courts also reasonably determined that Mr. Pitts's alcohol consumption and
15 intoxication did not render his statements involuntary or inadmissible. Because there was no
16 police misconduct, Mr. Pitts's challenge to his statements is without merit and the state court
17 decision denying this claim was not contrary to or an unreasonable application of clearly
18 established federal law. Accordingly, the undersigned recommends that Mr. Pitts's claim for
19 federal habeas relief on this claim be DENIED
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26 ¹ The record also reflects that Mr. Pitts does not suffer from post traumatic stress disorder. See, e.g., Dkt. 14, Exh. 46, pp. 1694-95.

Second Claim – Observation by Jurors of Petitioner in Restraints

Mr. Pitts raised two issues regarding jurors. The first occurred on April 4, 2005 during the jury panel voir dire and the second occurred on April 6, 2005, after the jury had been seated and some testimony had been presented.

On April 4, 2005, during voir dire, Mr. Pitts moved to disqualify the jury panel because the trial judge commented to the judicial assistant, in the presence of the jury panel members, that the jurors needed to be removed while Mr. Pitts was being escorted in and out of the courtroom. Dkt. 2, p. 18. Mr. Pitts' alleges that panel member Juror Number Four then informed the entire jury panel that the reason they had to leave the courtroom whenever Pitts entered or left the courtroom was because Pitts was transported in handcuffs. Dkt. 14, Exh. 38, p. 524. However, there was no evidence that any jurors actually saw Pitts in handcuffs during the jury selection process. *Id.*, p. 526.

Mr. Pitts also alleges that on April 6, 2005, while he was being escorted to the bathroom, two jury members observed him in restraints on his way to the bathroom and two more jury members observed him in restraints on his way back from the bathroom. *Id.* With regard to the April 6, 2005, incident, Tim Kavanaugh, a Pierce County Corrections Officer, advised the trial judge that one juror saw the Corrections Officers escorting the defendant, while handcuffed, to the restroom during a break and that two other jurors saw the defendant being escorted back to the courtroom while he was handcuffed. Dkt. 14, Exh. 40, pp. 847-848.

Kerry Glasgoe-Grant, one of the defendant's attorneys, advised the trial judge that she saw one of the jurors, a man with gray hair that was sitting in the second or third row, who came in behind the officers when they were escorting Mr. Pitts into the courtroom through the side door. *Id.*, p. 849.

1 The trial judge denied Mr. Pitt's motion for a mistrial, concluding the brief and
2 inadvertent observation of Pitts in handcuffs did not cause prejudice. Dkt. 14, Exh. 40, pp. 847-
3 54. The trial judge noted that intelligent civic minded individuals sitting on a jury are
4 sophisticated enough to understand that defendants standing trial most often are transported in
5 handcuffs. *Id.*, p. 853.

6 The Washington Court of Appeals determined Pitts did not show prejudice from the
7 jurors' brief observation of him outside of the courtroom in handcuffs:
8

9 Pitts first argues that he did not receive a fair trial by an impartial jury
10 because the jury knew that he was being transported to and from the courtroom in
11 handcuffs. He claims that the jury improperly presumed his dangerousness and
likelihood to commit murder, instead of presuming him to be innocent.

12 Fairness requires bringing a criminal defendant into the court's presence
13 free from restraints. *State v. Damon*, 144 Wn.2d 686, 690, 25 P.3d 418, 33 P.3d
14 735 (2001). Handcuffing the defendant in the jury's presence may violate his
15 constitutional rights because it suggests to the jury that he is dangerous and not to
16 be trusted. *Damon*, 144 Wn.2d at 690-91. This implicates the defendant's
17 constitutional rights to be presumed innocent, to testify on his own behalf, and to
18 confer with counsel during trial. *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d
694 (1981). Unless some compelling necessity requires that the defendant to be
restrained to secure him in custody and maintain the safety of others, handcuffing
the defendant in the presence of the jury violates article I, section 22 of the
Washington constitution. *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999).

19 We evaluate an unconstitutional restraining claim under a harmless error
20 standard. *Finch*, 137 Wn.2d at 861. We presume an error violating a
21 constitutional right to be prejudicial, unless it affirmatively appears from the
22 record to be harmless beyond a reasonable doubt. *Finch*, 137 Wn.2d at 859.
Harmless error may be established when the evidence against the defendant is so
overwhelming that no rational conclusion other than guilt can be reached. *Finch*,
137 Wn.2d at 859.

23 But when the jury's view of the defendant in shackles or handcuffs is brief
24 or inadvertent, the defendant must make an affirmative showing of prejudice and
25 carries the burden of curing any defect. *State v. Elmore*, 139 Wash.2d 250, 273,
26 985 P.2d 289 (1999). To demonstrate prejudice, the defendant must show "a
substantial or injurious effect or influence on the jury's verdict." *Elmore*, 139

1 Wn.2d at 274 (quoting *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061
2 (1998)).

3 Pitts relies on *Damon*, *Finch*, and *Hartzog* to establish that the hallway
4 incident amounts to constitutional error. He misplaces his reliance because in
5 those cases, the trial court ordered the defendant restrained throughout the entire
6 trial. *Damon*, 144 Wn.2d at 688; *Finch*, 137 Wn.2d at 804; *Hartzog*, 96 Wn.2d at
7 387. Similarly, in both *In the Personal Restraint of Davis*, 152 Wn.2d 647, 676-
8 77, 101 P.3d 1 (2004) and *Finch*, 137 Wn.2d 863, the defendants were visibly
9 shackled throughout the sentencing phase, in which character and future
10 dangerousness were at issue. These cases are inapposite because they involve a
11 situation where the trial court orders the defendant restrained in the courtroom in
12 the jury's presence. See *Elmore*, 139 Wn.2d at 275 (“[T]he trial court here did not
13 order Elmore shackled during sentencing.”).

14 The constitutional issues at stake in *Davis*, *Damon*, *Finch*, and *Hartzog* are
15 not implicated in this case because Pitts was not restrained throughout the trial as
16 a security measure. He was not restrained in the courtroom. Instead, he was
17 briefly seen restrained in the public hallway of the courthouse during a recess.
18 Because some of the jurors saw him handcuffed only briefly and by accident
19 during the trial outside the courtroom, *Elmore* controls and Pitts must demonstrate
20 prejudice.

21 Pitts fails to persuasively demonstrate that being briefly seen in handcuffs
22 by a few of the jurors early in the trial influenced the jury’s verdict. See *Damon*,
23 144 Wn.2d at 692. In *State v. Clark*, our Supreme Court noted that “it would
24 logically follow that in the minds of the jurors, Clark’s handcuffing on the first
25 day of voir dire was more than logically offset by over two weeks of observing
26 Clark in the courtroom without shackles.” 143 Wn.2d 731, 776, 24 P.3d 1006
(2001).

27 Similarly here, only a few of the jurors briefly saw Pitts handcuffed
28 outside of the courtroom near the beginning of a lengthy trial. Nothing in the
29 record suggests that as a result of this brief encounter, the jury determined that
30 Pitts was dangerous and, therefore, likely to have committed first degree murder.
31 See *State v. Ollison*, 68 Wn.2d 65, 69, 411 P.2d 419 (1966) (“Beyond the
32 statement of appellants’ counsel, the record contains no proof that the incident
33 inflamed or prejudiced the minds of any prospective jurors against appellants.”).
34 Pitts’s argument that the entire jury pool was tainted by one juror’s speculation
35 that he was being transported in handcuffs does not show prejudice because it is
36 unclear whether anyone who might have overheard the comment was seated on
37 the jury. As he fails to show prejudice, Pitts’s constitutional claim fails. See
38 *Elmore*, 139 Wn.2d at 274.

39 Dkt. 2, Exh. 2, pp. 6-8.

1 Clearly established federal law tells us that a defendant generally has a right to appear at
2 trial free from restraints. *Deck v. Missouri*, 544 U.S. 622, 626-29 (2005). However, the
3 “[c]haining of a prisoner in transport to the courtroom is a different matter” than forcing the
4 defendant to appear before the jury during trial in restraints. *Castillo v. Stainer*, 983 F.3d 145,
5 148 (9th Cir. 1992). The Ninth Circuit has “held that a jury’s brief or inadvertent glimpse of a
6 defendant in physical restraints outside of the courtroom does not warrant habeas corpus relief
7 unless the petitioner makes an affirmative showing of prejudice.” *Williams v. Woodford*, 384
8 F.3d 567, 593 (9th Cir. 2004) (citing *Ghent v. Woodford*, 279 F.3d 1121, 1133 (9th Cir. 2002);
9 *United States v. Olano*, 62 F.3d 1180, 1190 (9th Cir. 1995); *Castillo v. Stainer*, 983 F.2d at 148).

10
11
12 The brief or infrequent glimpse of a defendant being escorted in restraints to or from a
13 courtroom is not inherently or presumptively prejudicial, and the observation by jurors of a
14 handcuffed defendant outside of the courtroom is not reversible error absent a showing of actual
15 prejudice. *Ghent*, 279 F.3d at 1133. “No harm that rises to a constitutional level is done by such
16 an unintended, out-of-court occurrence.” *Castillo*, 983 F.2d at 148; *see also United States v.*
17 *Halliburton*, 870 F.2d 557, 559-61 (9th Cir. 1989) (citing cases where brief observance of
18 defendant being transported in handcuffs did not cause actual prejudice).

19
20 It is well established federal law that a jury’s brief or inadvertent glimpse of a defendant
21 in physical restraints outside of the courtroom does not warrant habeas corpus relief absent a
22 showing of prejudice. *See, e.g., Williams*, 384 F.3d at 593 (“a jury’s brief or inadvertent glimpse
23 of a defendant in physical restraints outside of the courtroom does not warrant habeas corpus
24 relief unless the petitioner makes an affirmative showing of prejudice.”) *A fortiori*, the mere
25
26

1 knowledge that a defendant may be handcuffed when being moved outside the courtroom fails to
2 warrant habeas corpus relief.

3 The undersigned concludes that the Washington Court of Appeals' determination that
4 Mr. Pitts could not show prejudice from the inadvertent viewing by jurors of Mr. Pitts in
5 restraints was not contrary to or an unreasonable application of clearly established federal law.
6 Accordingly, the undersigned recommends that Mr. Pitts's claim for federal habeas relief on this
7 claim be DENIED.
8

9 **Claim Three – Cumulative Error**

10 In this claim, Mr. Pitts alleges that the combination of errors (illegal confession and
11 handcuffing in view of jurors), when considered cumulatively, violate due process. Dkt. 2, p. 1.

12 Under the cumulative error doctrine, multiple constitutional errors, even if each one is
13 harmless when considered individually, may serve as a ground for habeas relief if the cumulative
14 effect is to prejudice the petitioner. See *Alcala v. Woodford*, 334 F.3d 862, 893 (9th Cir.2003);
15 *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir.2002); *Ceja v. Stewart*, 97 F.3d 1246, 1254-55
16 (9th Cir. 1996).
17

18 The Ninth Circuit has determined that it is clearly established Supreme Court precedent
19 that the combined effect of multiple trial errors may give rise to a due process violation if it
20 renders a trial fundamentally unfair, even where no single error considered individually rises to
21 the level of a constitutional violation or would independently warrant reversal. *Parle v. Runnels*,
22 505 F.3d 922, 928 (9th Cir.2007). “[T]he fundamental question in determining whether the
23 combined effect of trial errors violated a defendant's due process rights is whether the errors
24 rendered the criminal defense ‘far less persuasive,’ ... and thereby had a ‘substantial and
25 injurious effect or influence’ on the jury's verdict.” *Parle*, 505 F.3d at 928 (citations omitted).
26

1 The Washington Court of Appeals rejected Mr. Pitts's cumulative error argument:

2 Finally, Pitts contends that the cumulative prejudicial effect of trial errors
3 warrants reversal and remand. Although each error standing alone may be of
4 insufficient gravity to warrant reversal, the combined effect of an accumulation of
5 errors may require a new trial. *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859
(1963). Cumulative error does not deprive the defendant of a fair trial when there
6 is no prejudicial error. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38
(1990).

7 Pitts has not demonstrated that any of the alleged errors were prejudicial
8 such that he was denied a fair trial. Any defects in the proceeding were promptly
9 cured by the trial court, or were waived when he refused to request a curative
10 instruction. His cumulative error argument fails.

11 Dkt. 14, Exh. 2, p. 15.

12 This court has addressed each of Mr. Pitts's claims and concludes that the alleged errors,
13 even when considered together, did not render his defense "far less persuasive," nor did they
14 have a substantial and injurious effect or influence on the jury's verdict." See *Parle*, 505 F.3d at
15 928. The state court's rejection of Petitioner's cumulative error claim was not contrary to, or an
16 unreasonable application of, clearly established federal law as set forth by the Supreme Court.
17 Accordingly, the undersigned recommends that Mr. Pitts's third claim for habeas relief be
18 DENIED.

19 CERTIFICATE OF APPEALABILITY

20 A petitioner seeking post-conviction relief under § 2254 may appeal a district court's
21 dismissal of his federal habeas petition only after obtaining a certificate of appealability (COA)
22 from a district or circuit judge. A COA may issue only where a petitioner has made "a
23 substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(3). A
24 petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the
25 district court's resolution of his constitutional claims or that jurists could conclude the issues
26

presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Based on a thorough review of the record and analysis of the law in this case, the undersigned concludes that Mr. Pitts is not entitled to a COA with respect to any of the claims asserted in his petition because he has not demonstrated that jurists of reason could disagree with the district court's resolution of his constitutional claims or could conclude the issues presented are adequate to deserve encouragement to proceed further.

WRITTEN OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report and Recommendation to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985).

Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on **May 28, 2010**, as noted in the caption.

DATED this 6th day of May, 2010.

s/Karen L. Strombom
Karen L. Strombom
United States Magistrate Judge